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NAVAL WAR COLLEGE

Newport, R.I.

Surgical Counter-Terrorism: Targeting Individuals As An Operational Tool

by

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A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

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3 February 2003

Abstract

SURGICAL COUNTER-TERRORISM: TARGETING INDIVIDUALS AS AN OPERATIONAL TOOL

Following the Vietnam War, threats to U.S. national security have increasingly been focused in the realm of terrorist attacks targeting U.S. personnel and property domestically and abroad. The most recent attacks on September 11, 2001 caused over 3,000 deaths and shook the country to its core. In the wake of the September 11th attacks, President Bush declared war on international terrorism, one that would be protracted and require tactics and resources beyond conventional military forces. Historically, U.S. policy on terrorism has been to treat terrorist attacks as criminal acts and to locate and apprehend international terrorists for the purpose of prosecuting them in a court of law. With his decision to wage war against Al Qaeda and all other terrorist organizations with global reach, President Bush has removed this issue from the criminal justice arena and placed it firmly in the realm of warfare. Almost immediately, the topic of assassination as an operational tool surfaced and began to be debated within many circles of government. Can and should we employ targeting of individual terrorists as an operational tool to prosecute the war on terror?

Much has been written regarding assassination as a tool of foreign policy, though most authors have approached the

subject of assassination from the perspective of targeting political leaders during peacetime. After examining the legal, strategic and operational considerations associated with targeting individual terrorists during times of war, this paper will demonstrate that targeting individuals as an operational tool is legal and operationally effective in combating terrorism.

Introduction

In 1993, terrorists, acting in the name of Islamic fundamentalism, exploded a bomb in the basement of the World Trade Center in New York City. On August 7, 1998, terrorists bombed the U.S. embassies in Nairobi, Kenya and Dar-es-Salaam, Tanzania. On October 12, 2000, the USS COLE (DDG 67) was attacked by terrorists in a small boat while conducting a port call in Aden, Yemen. The terrorists detonated explosives that ripped a gaping hole in her hull killing seventeen U.S. sailors and injuring many more. On September 11, 2001, terrorists destroyed the World Trade Center in New York City by flying a passenger airliner into each of the two towers. On that same morning, terrorists crashed a third passenger airliner into the Pentagon in Washington, D.C. A fourth jet crashed into the Pennsylvania countryside after passengers on board managed to overpower the terrorists and thwart their plans to attack an unknown target (possibly the White House).

Following the September 11th attacks, President Bush ordered the U.S. military to invade Afghanistan in conjunction with coalition forces to destroy Al Qaeda and the Taliban forces that support Usama Bin Laden. A videotape was recovered showing Usama Bin Laden describing in detail the planning and execution of the September 11th attacks. Usama Bin Laden and the Al Qaeda terrorist network are also suspected of planning and executing the original attack on the

World Trade Center in 1993, the embassy bombings in Kenya and Tanzania, and the attack on the USS COLE. It is clear from Usama Bin Laden's statements and actions that he and Al Qaeda pose a continuing threat to the national security of the United States.

In the wake of the attacks of September 11, 2001, President Bush declared war on international terrorism, one that would be protracted and require tactics and resources beyond conventional military forces. He identified Usama Bin Laden and his Al Qaeda organization as the first objective of this war. Historically, U.S. policy on terrorism has been to treat terrorist attacks as criminal acts and to locate and apprehend international terrorists for the purpose of prosecuting them in a court of law.¹ With his decision to wage war against Al Qaeda and all other terrorist organizations with global reach, President Bush has removed this issue from the criminal justice arena and placed it firmly in the realm of warfare. Almost immediately, the topic of assassination as an operational tool surfaced and began to be debated within many circles of government. Can and should we employ targeting of individual terrorists as an operational tool to prosecute the war on terror?

¹ Thomas Geraghty, "The Criminal-Enemy Distinction: Prosecuting A Limited War Against Terrorism Following The September 11, 2001 Terrorist Attacks," McGeorge Law Review 33 (Spring 2002): 551-591.

Much has been written regarding assassination as a tool of foreign policy, though most authors have approached the subject of assassination from the perspective of targeting political leaders during peacetime. After examining the legal and operational ramifications of targeting individuals (specifically terrorists) during times of war, this paper will demonstrate that targeting individuals as an operational tool is legal and operationally effective in combating terrorism. The overall framework of this paper will be an examination of those issues that are of critical concern to a Joint Force Commander tasked with prosecuting the war on terrorism.

Definitions

In his article, "Memorandum of Law: Executive Order 12333 and Assassination," W. Hays Parks, Chief of the International Law Division, United States Army Office of the Judge Advocate General, writes: "In peacetime, the citizens of a nation -- whether private individuals or public figures -- are entitled to immunity from intentional acts of violence by citizens, agents, or military forces of another nation . . . Peacetime assassination, then, would seem to encompass the murder of a private individual or public figure for political purposes, and in some cases (as cited above) also require that the act constitute a covert activity, particularly when the individual is a private citizen. Assassination is unlawful

killing, and would be prohibited by international law even if there were no executive order proscribing it."² In this same article, he offers several definitions of assassination that generally contain the elements of treachery and political purpose.³ These definitions predominantly address political assassination conducted during peacetime. The question before us is whether targeting individuals during war constitutes assassination. Michael Schmitt concludes that a definition of wartime assassination contains two elements: the targeting of an individual, and the use of treacherous⁴ means. Any action that lacks either element would not be classified as assassination.⁵ Parks concurs with this assessment when he writes:

Assassination in wartime takes on a different meaning. As Clausewitz noted, war is a "continuation of policy by other means."⁶ In wartime the role of the military includes the

²W. Hays Parks, "Memorandum of Law: Executive Order 12333 and Assassination," Army Lawyer (December 1989): 4.

³ Ibid., 8.

⁴ Schmitt explains: "The term 'treachery,' a critical component in the current law of armed conflict, is designed as a breach of confidence by an assailant. However, one must be careful not to define a treacherous act too broadly. Use of stealth or trickery, for instance, is not precluded, and will not render an otherwise lawful killing an assassination. Treachery exists only if the victim possessed an affirmative reason to trust the assailant. Thinking in terms of ruses and perfidy is useful in understanding this distinction: ruses are planned to mislead the enemy, for example, by causing him to become reckless or choose a particular course of action. By contrast, perfidy involves an act designed to convince the enemy that the actor is entitled to protected status under the law of war, with the intent of betraying that confidence. Treachery, as construed by early scholars, is thus broader than the concept of perfidy; nevertheless, the same basic criteria that are used to distinguish lawful ruses from unlawful perfidies can be applied to determinations of treachery." Michael Schmitt, "State Sponsored Assassination in International and Domestic Law," Yale Journal of International Law 17 (1992): 617.

⁵ Ibid., 632.

⁶ Carl Von Clausewitz. On War, ed. Michael Howard and Peter Paret (Princeton: Princeton University Press, 1976), 87.

legalized killing (as opposed to murder) of the enemy, whether lawful combatants or unprivileged belligerents, and may include in either category civilians who take part in the hostilities. The term assassination when applied to wartime military activities against enemy combatants or military objectives does not preclude acts of violence involving the element of surprise. Combatants are liable to attack at any time or place, regardless of their activity when attacked. Nor is a distinction made between combat and combat service support personnel with regard to the right to be attacked as combatants; combatants are subject to attack if they are participating in hostilities through fire, maneuver, and assault; providing logistic, communications, administrative, or other support; or functioning as staff planners. An individual combatant's vulnerability to lawful targeting (as opposed to assassination) is not dependent upon his or her military duties, or proximity to combat as such.⁷

In essence, a combatant participating in armed conflict may be attacked by any means and with any weapon allowed under international law provided the attack is not conducted using treachery or perfidy.⁸ From this analysis, it is clear that the practice of targeted killings conducted during wartime does not constitute assassination. The question remains: Are terrorists considered to be combatants and legally subject to attack?

The Law of Armed Conflict

⁷ Parks, 4-5.

⁸ Schmitt explains: "... surprise alone can never constitute assassination. An enemy has no right to believe he is free from attack without prior notice... Similarly, the use of aircraft to kill a specific individual would not constitute assassination unless those aircraft were improperly marked, for example medical symbols. The same analysis applies to naval vessels. The prohibition on treachery does not require attackers to meet their victim face to face. Thus, a special forces team may legitimately place a bomb in the residence of the target or shoot him from a camouflaged position. Such actions do not involve the misuse of protected status, and so involve no perfidy." Schmitt, 634.

The Law of Armed Conflict defines a combatant as a member of the regularly organized armed forces of a party to the conflict as well as irregular forces who are under responsible command and subject to internal military discipline, carry their arms openly, and otherwise distinguish themselves clearly from the civilian population. Noncombatants are primarily members of the civilian population and certain members of the armed forces who enjoy special protected status (medical personnel, religious personnel, wounded, and Prisoners of War). International law forbids the attack of noncombatants. However, civilians who participate directly in armed combat are acting unlawfully and are considered unlawful combatants. Thus, they are subject to attack without the corresponding protections afforded to lawful combatants by the Geneva Accords of 1949.⁹ Within the context of our current War on Terrorism, terrorists clearly meet the definition of a combatant. Though they operate under the guise of civilian noncombatant status, they cross the threshold into the realm of unlawful combatants when they directly participate in armed conflict by attacking U.S. interests. As such, they can be lawfully attacked in accordance with international law.

⁹Department of the Navy, The Commander's Handbook On The Law Of Naval Operations, NWP 1-14M (Norfolk, October 1995), p. 5-3

The Law of Armed Conflict prohibits assassination which is considered to be an attack using treacherous or perfidious means. Parks further clarifies:

Nor does the prohibition on assassination limit means that otherwise would be lawful. No distinction is made between an attack accomplished by aircraft, missile, naval gunfire, artillery, mortar, infantry assault, ambush, land mine or booby trap, single shot by a sniper, a commando attack, or other, similar means. All are lawful means for attacking the enemy and the choice of one vis-à-vis another has no bearing on the legality of the attack. If the person attacked is a combatant, the use of a particular lawful means for attack (as opposed to another) cannot make an otherwise lawful attack either unlawful or an assassination.¹⁰

The Law of Armed Conflict does not contain any specific prohibition against targeting individuals. Thus, with respect to international law, members of Al Qaeda are considered to be combatants and subject to any lawful means of attack (including targeted killing) because they are engaged in armed conflict against U.S. interests. We have clarified the legality of targeted killing under international law; now we must examine domestic law regarding targeted killing.

Executive Order 12333

In 1975, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the Church Committee) issued a comprehensive report in which it found that the United States Government was implicated in five assassinations or attempted assassinations

¹⁰ Parks, 5.

against foreign government leaders since 1960. In response to the Church Committee report and in an effort to forestall Congressional legislation that would adversely affect the CIA, President Ford promulgated Executive Order 11905 titled, "United States Intelligence Activities". This order was revised and issued as Executive Order 12036 by President Carter in 1978. In 1982, President Reagan incorporated the two previous Executive Orders when he issued Executive Order 12333, which states:

2.11 Prohibition on Assassination. No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.

2.12 Indirect Participation. No agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order.¹¹

Executive Orders have the weight of law without the corresponding punitive provisions for violation. They must be retained in force by each successive President, otherwise they merely lapse. In the case of Executive Order 12333, Presidents Bush, Carter, and George W. Bush each retained the order in force in its entirety. Many legal scholars and government officials (to include Congress and various presidents) point to Executive Order 12333 as the legal basis for prohibiting targeted killings in wartime. Unfortunately, Executive Order 12333, while prohibiting assassination, does not provide a clear definition of assassination, thus

ambiguity exists with regard to prohibited activities and targets. However, if you consider the context in which the original Executive Order (Executive Order 11905) was issued, one could argue that the order restricts the activities of intelligence agencies in peacetime, but not the conduct of military operations in time of war. In fact, the report issued by the Church Committee contains language that specifically excludes situations in which the United States is engaged in armed conflict pursuant to a declaration of war or hostilities authorized pursuant to the War Powers Resolution. Thus, from the circumstances surrounding the issuance of the original Executive Order and the language of the Church Committee report, one can conclude that the domestic ban on assassination is strictly limited to peacetime situations and is not meant to cover operations conducted in the course of armed conflict. Therefore, in considering the legality of targeting individual terrorists, we must answer the question: Are we at war?

An Armed Attack

Article 2, paragraph 4 of the Charter of the United Nations provides that "Member States shall refrain in their international relations from the threat or use of force against the territorial integrity or political

¹¹ President, Executive Order 12333, "United States Intelligence Activities," 3 Code of Federal Regulations

independence of any state, or in any manner inconsistent with the Purpose of the United Nations.”¹² However, Article 51 of the U.N. Charter differentiates situations involving national self-defense (both individual and collective). Article 51 authorizes the use of force by a nation to defend itself from armed attack. The question arises of what constitutes an armed attack. Can a terrorist attack (i.e. 9/11) constitute an armed attack against the territorial integrity or political independence of the United States?

Historically, the United States has interpreted Article 51 as embracing three types of self-defense: (1) Self-defense in the face of the real use of force or hostile actions; (2) Self-defense as a preventive action in the face of immediate activities where it is anticipated that force will be used; (3) Self-defense in the face of a persistent threat.¹³ The attacks on our embassies, the USS COLE, and the September 11th attacks would certainly qualify under the first category. However, when considering the use of force in a preemptive manner as intended by President Bush, one must look to the last two categories of self-defense. On February 22, 1998, Usama Bin Laden published the “Declaration of the World

(1981 compilation), 200.

¹² Charter of the United Nations, article 2, paragraph 4.

¹³ Emanuel Gross, “Thwarting Terrorist Acts By Attacking The Perpetrators Or Their Commanders As An Act Of Self-Defense,” Temple International and Comparative Law Journal 15 (Fall 2001):195

Islamic Front For Jihad Against the Jews and the Crusaders."

Within this epistle, he issued a fatwa, or ruling:

To kill Americans and their allies, both civil and military, is an individual duty of every Muslim who is able, in any country where this is possible, until the Aqsa Mosque (in Jerusalem) and the Haram Mosque (in Mecca) are freed from their grip and until their armies, shattered and broken-winged, depart from all the lands of Islam, incapable of threatening any Muslim.¹⁴

This declaration is significant in that it is an unequivocal statement of intent to continue terrorist attacks against U.S. citizens, military personnel, and property worldwide.

Clearly, Usama Bin Laden and Al Qaeda constitute imminent and continuing threats to the security of the United States.

Therefore, the United States would be justified in employing military force for national self-defense in accordance with Article 51 of the U.N. Charter. However, the U.N. Charter addresses relations between member states. Can Article 51 of the U.N. Charter be applied to non-state actors such as Usama Bin Laden and Al Qaeda?

U.N. Security Council Resolution 1368 of September 12, 2001 answers this question when it provided international recognition of the September 11th attacks as an armed attack. It recognized the inherent right of individual or collective self-defense in accordance with the U.N. Charter and regarded the September 11th attacks (and all acts of international

¹⁴ Ahmed S. Hashim, "The World According To Usama Bin Laden," Naval War College Review (Autumn 2001): 27-28.

terrorism) as a threat to international peace and security.¹⁵ When NATO invoked the collective self-defense clause contained in Article 5 of its charter, it provided further international recognition that the September 11th attack was indeed an armed attack against one of its member nations and considered an act of war against all members of NATO. It is clear that the international community considers the United States to be at war against international terrorism and supports the use of military force against Al Qaeda. However, given our historical policy of treating terrorists as criminals rather than as combatants, how would we justify the use of military force against Usama Bin Laden and Al Qaeda?

Combatant or Criminal?

The Authorization for Use of Military Force (AUMF) passed by Congress and signed into law by President Bush on September 20, 2001 authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."¹⁶ It

¹⁵ United Nations Security Council Resolution 1368 (September 12, 2001)

¹⁶ Authorization for Use of Military Force (AUMF), Public Law No. 107-40, 115 Statute 224 (2001)

further stated that, "Consistent with section 8(a) (1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution."¹⁷ This legislation explicitly granted the President of the United States the statutory authority to commit military forces in the armed conflict against enemy terrorists.

In a recent case, the U.S. Court of Appeals for the Fourth Circuit unanimously decided that a wartime President can indefinitely detain a United States citizen captured as an enemy combatant on the battlefield and deny that person access to a lawyer. The three-judge panel ruled that President Bush was due great deference in conducting the war on terrorism.¹⁸ This ruling is significant for two reasons. First, it implicitly recognizes that the United States is in a state of war as it employs military force against terrorism and terrorist organizations. Secondly, it recognizes that those who oppose our military actions on the battlefield are to be regarded as combatants for purposes of domestic law. Accordingly, they are not afforded the normal protections

¹⁷ Ibid.

¹⁸ Neil A. Lewis, "U.S. Is Allowed To Hold Citizen As Combatant," The New York Times, January 9, 2003, sec. A, p. 1.

provided by the Constitution and our criminal justice system.

After considering both aspects in conjunction with each other, one can conclude that members of terrorist organizations are considered to be combatants rather than criminals, thus they can be targeted for military action rather than apprehended for criminal prosecution. This does not imply that they are classified as privileged combatants under the Law of Armed Conflict. Since they do not meet the criteria for classification as lawful combatants as set forth by international law, they are regarded as unlawful combatants. The language of the AUMF and the decision of the Appellate Court clearly portray the nation to be in a state of war and define enemy terrorists, as stipulated in the AUMF, as enemy combatants. As such, they are valid military targets and may be individually targeted for attack without fear of violating Executive Order 12333.

Strategic Considerations For the Joint Force Commander

One could argue that the leader of a terrorist organization is its center of gravity because he is generally a charismatic personality who is not easily replaced. In applying operational art, it would make sense to target the leader in order to achieve one's objective of neutralizing or destroying the terrorist organization's ability to operate.

If you accept the premise that a terrorist organization gains its moral impetus from its charismatic leader, then eliminating that leader should impair or destroy the organization's ability to conduct further attacks. The question arises whether this is truly the case. Many have argued that targeting leaders of terrorist organizations is not effective because the successor may be equally or more dangerous. Although this may be true, it should not preclude the Joint Force Commander from considering this viable course of action. Terrorists may be prepared to die as martyrs in the service of their cause, but they are still human. A terrorist undoubtedly prefers to live unless his death would directly advance the cause for which he fights. Therefore, the constant threat of imminent death at the hands of an unknown assailant would likely introduce a debilitating level of stress and fear. At the very least, the necessity of maintaining a heightened level of security would inject friction into the normal operations of the terrorist organization, thus impairing its effectiveness. The fact that we are not able to attack every terrorist is irrelevant. The terrorist has no way of knowing who we are targeting next. Once we have successfully eliminated a few prominent terrorists, the rest will have to operate under the assumption that they may be next. The concern that a successor to the slain leader may prove even more dangerous than his

predecessor becomes a moot point if we are prepared to continue eliminating successive layers of command. While the Joint Force Commander would certainly prefer to defeat the enemy's center of gravity and sever the jugular in one swift blow, attrition warfare still has merit when our side has the greater resources.

The question arises whether a policy of anticipatory self-defense is effective against terrorism. It can be argued that Israel's experience with the Palestinians demonstrates that it is not. Israel, despite repeated retaliatory strikes against Palestinian targets in the aftermath of each new terrorist attack, has been unable to halt these attacks. While it is certainly true that Israel has not successfully halted all terrorist attacks, it is less certain that they have not been able to deter some attacks. It is obvious when a terrorist attack is successful. However, we cannot account for those attacks that were aborted or failed as a result of Israel's actions.

It is important to distinguish between Israel's practice of military strikes and the use of targeted killing. Israel has typically responded to terrorist attacks with full-scale military assaults that produce significant collateral damage.

Casualties and property damage suffered by innocent Palestinian civilians undoubtedly serves to bolster support for the terrorists' cause and is counterproductive to

achieving Israel's objectives. William Farrell highlights this point when he writes, "Of the many purposes for which terrorists conduct their activity, there are two which either attempt to have a government overreact or, by not reacting, show inherent weakness. Those who decide to make use of soldiers in lieu of police must heavily weigh these factors. Are they doing what is needed, or what the terrorists want?"¹⁹

Striking indiscriminately with military force is rarely effective against terrorism as it tends to produce more converts to the terrorists' cause. Scenes of devastation broadcast by the international news media provoke sympathy for the innocent victims and portray the government as the offending party rather than the terrorist. Criminal investigations against the highest echelons of terrorist leadership are equally ineffective due to the inherent difficulty of gathering admissible evidence and extradition. On the other hand, surgical counterstrikes (targeted killings) would accomplish the objective of disrupting terrorist activities while mitigating the negative effects of collateral damage. Reports of terrorists mysteriously dying violently will gradually increase the level of fear and paranoia in an organization. Ultimately, the organization may implode when

¹⁹William Farrell, The U.S. Government Response to Terrorism (Boulder: West View Press, 1982), 122.

the terrorists begin to cannibalize each other as each regards the other as a possible Judas Iscariot.

Brian Jenkins, a policy analyst for the Rand Corporation, asserts that we have the most to lose in a battle of assassins. He argues that the United States, as an open society, is far more vulnerable to retaliatory assassination of our leaders than our opponents.²⁰ In other words, we should not do unto others that which we would not want done to us. Employing a policy of targeted killing might open the floodgates of retribution. This presumes that terrorists have a sense of morality and refrain from assassinating our leaders as a quid pro quo for our restraint. This position is without merit if you consider the fact that a terrorist's primary tactic is to attack innocents without provocation, warning, or regard for morality. The terrorist's sole purpose is to inflict maximum damage with accompanying media exposure. It is naïve and unrealistic to think that a terrorist would show restraint simply because we do. In any event, restricting our freedom of action based on the fear of an enemy's potential response is conceding him the initiative. Risk is inherent in any military endeavor. Avoiding risk is defeatist; properly assessing risk and mitigating its effects are integral to operational art. Rather than prohibiting the employment of an operationally effective policy, the commander should ensure

that our national leadership is prepared to take the necessary precautions to manage the associated risk.

One could argue that targeted killing is not a viable policy because such an operation would inevitably be covert and would require violating international law. The presumption is that a soldier in uniform openly bearing arms would never get close enough to the target to pull the trigger (figuratively speaking; the same holds true for a Special Operations unit designating a target for a PGM strike). Therefore, success would be predicated upon our military forces operating in disguise (indistinguishable from civilian noncombatants), thus violating the Law of Armed Conflict and forfeiting the protections afforded by the Geneva Convention.

This is a fallacious argument for several reasons. First of all, the Law of Armed Conflict does not prohibit covert infiltration and exfiltration. One does not have to be in uniform and openly bear arms while in transit, only during the actual execution of combat. Secondly military forces apprehended by a host nation would be treated in accordance with the status of diplomatic relations that existed between the United States and that nation. The Law of Armed Conflict addresses international armed conflict; if we are not in a state of hostilities with the host nation, then combatant status is irrelevant. Instead, it would become an issue of

²⁰ Brian Michael Jenkins, "Should Our Arsenal Against Terrorism Include Assassination?"

the United States having violated that nation's sovereignty. Our forces would be subject to that nation's domestic laws and their treatment would largely depend upon whether or not we were conducting operations with the host nation's knowledge and consent. While this should certainly be considered in the Commander's assessment of the operation's risk, it should not preclude him from pursuing mission accomplishment. Thirdly, our current technology provides us with the option of conducting operations against individual terrorists without having personnel on the ground. In November 2002, the CIA employed a Predator Unmanned Aerial Vehicle (UAV) to fire a Hellfire missile against the vehicle carrying Qaed Salim Sinan al-Harethi, a key Al Qaeda leader in Yemen who was suspected of helping plan the USS COLE attack.²¹

Brian Jenkins also argues that targeted killings of terrorists compromise the democratic ideals that are America's foundation. He likens assassination to discarding the human rights of the accused, determining guilt in absentia without affording the defendant due process, and unilaterally serving as judge, jury, and executioner. He further states that targeting individuals is in effect adopting the tactics of our

RAND Papers, no. 7303 (Santa Monica, CA: Rand Corp., 1987), 8.

²¹ James Risen and David Johnston, "Bush Has Widened Authority of CIA to Kill Terrorists," The New York Times, December 15, 2002.

enemy, the terrorist.²² There are two faults with this line of reasoning. Firstly, terrorists target innocent noncombatants while we are targeting combatants. Secondly, we are in a state of armed conflict against international terrorist organizations. The Authorization for Use of Military Force passed by Congress and signed into law by President Bush authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations."²³ Accordingly, terrorists are to be treated as combatants, not criminals. As such, they do not rate the protections of due process inherent in our legal system. As combatants, they are to be engaged with all necessary and appropriate force consistent with rules of engagement and in accordance with international law. As is the case with any military operation, the objective is destruction of the enemy, not capture. Therefore, targeted killing is a legal and militarily appropriate action against a lawful target.

²²Brian Michael Jenkins, "Terrorism: Policy Issues For The Bush Administration," RAND Papers, no. 2964 (Santa Monica, CA: Rand Corp., 1989), 11-25.

²³Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001)

Operational Considerations For The Joint Force Commander

It is clear from an examination of international and domestic law that targeted killing of individual terrorists does not constitute assassination and is a legal military action. It is also clear that targeted killing is operationally effective. A Joint Force Commander, secure in the legality of his methods, needs to consider the operational risks and benefits of employing targeted killing. Does the intended target meet the criteria of an enemy terrorist as stipulated in the AUMF? The Congressional resolution did not provide blanket authorization to engage all terrorists, only those that were involved in the planning, execution, and support of the September 11th attacks. The Commander must obtain intelligence establishing a credible link between the intended target and the September 11th attacks. This is critical to ensure that the target is properly determined to be a combatant and subject to military attack rather than a criminal to be apprehended for judicial proceedings.

One of the major issues that the Commander will have to resolve is the question of sovereignty. Since he will be conducting the operation in a foreign country, he will need the Ambassador to obtain consent from that nation in order to avoid complicated issues of sovereignty. This raises concerns on two levels. In order to obtain consent, the Joint Force

Commander would likely have to share sensitive information with the host nation regarding the nature of our operation, thus potentially compromising the operation. Secondly, what recourse would we have if the nation refused to cooperate? While we could certainly invoke the doctrine of forcible self-help (entering the sovereign territory of another nation when that nation cannot or will not act against the perpetrators of an armed attack), that would be a complicated diplomatic issue. The Joint Force Commander should enlist the assistance of the Ambassador and the Department of State as soon as he begins to plan such an operation.

The next area of concern for the Joint Force Commander is the intelligence necessary to plan and execute a successful attack. The Commander must have timely, accurate, and relevant intelligence with which to identify, locate, and attack the target (this is easier said than done). The most accurate source of intelligence for this purpose is human intelligence (HUMINT) which is scarce and extraordinarily difficult to obtain in a timely manner given the nature of our targets. Most of our military intelligence assets (organic reconnaissance units) do not fit in with the populations in which the terrorists operate. Thus, the Joint Force Commander may have to rely heavily upon foreign HUMINT assets with attendant concerns regarding availability and reliability. The Commander will likely also need to rely on intelligence

provided by foreign nations, an uncertain proposition depending on the particular source. He must ensure that his intelligence staff is constantly collecting on possible targets within his area of responsibility in order to capitalize on opportunities when they present themselves.

The issues of sovereignty and intelligence highlight an aspect of such operations that poses the greatest concern for the Joint Force Commander, the complexity of multinational interagency operations. The intelligence required for successful execution will potentially come from multiple civilian and foreign agencies. The mission will possibly also require logistical and operational support from civilian and foreign agencies as well as the consent and cooperation of foreign governments. Finally, the primary responsibility for executing the operation may well be tasked to a civilian agency rather than a military unit. Such operations require detailed interagency planning, extensive coordination and precise execution. The Commander must be equally prepared to act in a supporting or supported role as directed by higher authority. He must ensure that his Special Operations Forces are properly trained, equipped, and supported in order to execute missions on short notice whenever the opportunity presents itself. He must also ensure that his staff and all agencies involved are synchronizing their efforts, a task that

will occupy most of his attention until mission accomplishment.

Conclusion

While there are many complexities associated with targeted killing, it is nonetheless a legal and operationally effective course of action. There are certainly many risks and uncertainties involved with such an operation, but that should not deter a Joint Force Commander from employing this course of action when the situation warrants it. Though the elimination of a given terrorist might fail to achieve the desired operational effects, the same can be said when considering any potential military operation. The fog and friction of war are always present and risk is inherent in every operation. In the end, the possibility of a brilliant plan flawlessly executed producing ineffectual results should not deter the Joint Force Commander from considering this tactic if the potential benefits outweigh the known risks. It is the commander's talent at weighing all of the factors and choosing the best course of action that provides the greatest likelihood of success.

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